Filed 7/2/18 P. v. Cota CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHARLES COTA, Defendant and Appellant.	F073303 (Super. Ct. No. BF160857A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Patricia L. Watkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Catherine Chatman, and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE CONCURRING AND DISSENTING OPINION

Charles Cota (defendant) stands convicted, following a jury trial, of assault with a deadly weapon, in the commission of which he personally inflicted great bodily injury (Pen. Code,[1] §§ 245, subd. (a)(1), 12022.7; count 1), battery with serious bodily injury, in the commission of which he personally used a deadly weapon (§§ 243, subd. (d), 12022, subd. (b)(1); count 2), and child abuse under circumstances likely to produce great bodily harm or death, in the commission of which he personally inflicted great bodily injury (§§ 273a, subd. (a), 12022.7; count 3). Following a bifurcated court trial, he was found to have previously been convicted of a serious felony (§ 667, subd. (a)) that was also a strike (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)), and to have served six prior prison terms (§ 667.5, subd. (b)). He was sentenced to a total unstayed term of 25 years in prison, and ordered to pay restitution and various fees, fines, and assessments.

On appeal, we hold: (1) Sufficient evidence supports defendant's conviction on count 3; (2) Sufficient evidence supports the trial court's finding that defendant's prior aggravated assault conviction constituted a serious felony and, hence, a strike; (3) The trial court did not improperly impose five-year and one-year enhancements based on the same prior conviction; and (4) Defendant's 1989 prior prison term enhancement was properly imposed, and defendant's alternative claim of ineffective assistance of counsel fails. Accordingly, we affirm, but will direct the correction of a clerical error contained in the sentencing minutes.

FACTS

At approximately 2:15 a.m. on June 19, 2015, the cashier at the Valero gas station on California and Union Avenues, in Bakersfield, saw two young African-American males ride up on bicycles. One entered the store, while the other remained outside, talking on his cell phone while he rode in circles around the gas pumps.

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[1] All statutory references are to the Penal Code unless otherwise stated.

While the cashier assisted the one who came inside, he saw someone running. The person was wearing clothing similar to that worn by defendant, whom the cashier had told to leave the premises about 15 minutes earlier. The young man who had been riding around the gas pumps came in, saying, "he got me, he got me," then lay down in the doorway. The cashier called 911 and put pressure on the young man's back, which was bleeding.

Bakersfield Police Officer Hensley responded to the gas station. Upon arrival, he observed Stephen B. lying in the doorway of the business.[2] Stephen had an approximately one-inch laceration to his lower middle back and a small laceration to his left elbow, both of which were closed by staples at the hospital.

In viewing the gas station's surveillance footage at trial, the manager of the gas station recognized the assailant as defendant.[3] Defendant was frequently at the station, asking for money and alcohol. When he was seen at the gas station a few days after the stabbing, the manager called the police.

DISCUSSION

I

COUNT 3

Defendant contends the evidence is insufficient to sustain his conviction on count 3, because it fails to establish Stephen was under 18 years of age. That the victim was a child — someone under 18 years old — is an element of a violation of section 273a, subdivision (a). (See *People v. Lee* (1991) 234 Cal.App.3d 1214, 1228; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857-858.)

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[2] In order to protect his privacy, we refer to Stephen by his first name. No disrespect is intended.

[3] Surveillance video showing the incident was played for the jury.

The applicable legal principles are settled. The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson, supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "If the circumstances reasonably justify the [trier of fact's] findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Instead, reversal is warranted only if "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

Stephen did not testify at trial. Jurors were, however, shown photographs of him taken a short time after the stabbing. In addition, Hensley testified Stephen was approximately 16 years old, while Detective Paglia, who met with Stephen just under a month after the incident, testified Stephen was approximately 16 or 17 years old.

This evidence, though circumstantial, was sufficient to establish Stephen was under 18 years old at the time of the incident. " 'Age is provable by the inference of any competent observing witness.' " (*People v. Bond* (1910) 13 Cal.App. 175, 191.) " 'Experience teaches us that corporal appearances are approximately an index of the age

of their bearer, particularly for the marked extremes of old age and youth. In every case such evidence should be accepted and weighed for what it may be in each case worth. In particular the outward physical appearance of an alleged minor may be considered in judging of his age . . . .' [Citations.]" (*People v. Montalvo* (1971) 4 Cal.3d 328, 335, italics omitted.)

We recognize defendant's jury saw only photographs of Stephen, rather than viewing him in person. There is no suggestion, however, that the photographs — which are contained in the record on appeal and which we have reviewed — are in any way misleading with respect to Stephen's appearance, or that a live view of him would have been materially different. Moreover, jurors heard the officers' testimony, and were instructed both that the prosecution had to prove Stephen was under 18 years old with respect to count 3, and on the consideration of lay opinion testimony.

We also recognize the officers gave approximations of Stephen's age. His exact age was not an element of the offense, however. Rather, he merely had to be under the age of majority. The officers' testimony in this regard, coupled with the photographs, constituted evidence that was "reasonable, credible, and of solid value." (*People v. Johnson, supra*, 26 Cal.3d at p. 578; see *People v. Caldwell* (1921) 55 Cal.App. 280, 296.) Its weight was for jurors to determine, as was the validity of the cashier's approximation that Stephen and his companion, to whom the cashier referred as "kids," were "[p]robably around [their] 20's." (*People v. Provencio* (1989) 210 Cal.App.3d 290, 306.)[4]

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[4] It has been suggested that if age is to be determined from appearance and the subject is in court, the jury can resolve the question without the aid of opinion evidence. (*People v. Caldwell, supra*, 55 Cal.App. at p. 296.) We need not decide whether this is so where photographs of the subject are concerned, or whether, as required for admission of lay opinion testimony, the approximation of Stephen's age was "[h]elpful to a clear understanding of" the officers' testimony. (Evid. Code, § 800, subd. (b).) That testimony was given without objection, and so " ' "[took] on the attributes of competent proof when

II

THE 2012 CONVICTION

The information alleged, and the court found, that defendant was convicted in 2012 of assault with a deadly weapon other than a firearm, in violation of section 245, subdivision (a)(1), and that the offense was a serious felony and a strike. As a result, the trial court doubled the base term imposed on count 3, which it designated as the principal term, and imposed a consecutive five-year enhancement.

The offense underlying the conviction was committed in 2011. At that time, subdivision (a)(1) of section 245 proscribed both assault with a deadly weapon other than a firearm *and* assault by means of force likely to produce great bodily injury.[5] Assault with a deadly weapon is a serious felony, but assault by means of force likely to produce great bodily injury (the "GBI prong") is not, absent the additional element of personal infliction of great bodily injury. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065 (*Delgado*).)

In the present case, the People presented a certified Criminal Justice Information System (CJIS) printout reflecting that during defendant's change of plea hearing, he was advised of the consequences of a plea to a strike or serious felony. The People also presented certified copies of prison records (§ 969b) that included the abstract of judgment in the case. The abstract of judgment showed defendant was convicted, by plea, of violating "PC 245(a)(1)," "ASSAULT W/DEADLY WEAPON."

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considered upon the question of sufficiency of the evidence to support" ' " the jury's finding. (*People v. Panah* (2005) 35 Cal.4th 395, 476.)

[5] As of January 1, 2012, subdivision (a)(1) of section 245 now proscribes assault with a deadly weapon or instrument other than a firearm, while subdivision (a)(4) of the statute proscribes assault by any means of force likely to produce great bodily injury. All references to section 245, subdivision (a)(1) are to the statute as it existed before this amendment.

Defendant now contends the evidence was insufficient to establish his 2012 conviction was a serious felony. The California Supreme Court has summarized the applicable law as follows:

> "The People must prove each element of an alleged sentence enhancement beyond a reasonable doubt. [Citation.] Where, as here, the mere fact that a prior conviction occurred under a specified statute does not prove the serious felony allegation, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. [Citations.][6]
>
> "A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison, including the abstract of judgment describing the prior offense. [Citations.]
>
> " '[T]he trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction . . . .' [Citations.] '[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold requirements of admissibility. [Citation.] Some evidence must rebut this presumption before the authenticity, accuracy, or sufficiency of the prior conviction records can be called into question.' [Citation.]
>
> "Thus, if the prosecutor presents, by such records, prima facie evidence of a prior conviction that satisfies the elements of the recidivist

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6 Recently, in *People v. Gallardo* (2017) 4 Cal.5th 120, the court stated: "[W]hen the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, '[t]he Sixth Amendment contemplates that a jury — not a sentencing court — will find such facts, unanimously and beyond a reasonable doubt.' [Citation.] While a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence [in *Gallardo*, the preliminary hearing testimony] to determine what conduct 'realistically' led to the defendant's conviction. Here, the trial court violated defendant's Sixth Amendment right to a jury trial when it found a disputed fact about the conduct underlying defendant's assault conviction that had not been established by virtue of the conviction itself." (*Id.* at pp. 124-125.) *Gallardo* does not affect our review of the trial court's determination in defendant's case.

enhancement at issue, and if there is no contrary evidence, the fact finder, utilizing the official duty presumption, may determine that a qualifying conviction occurred. [Citations.]

"However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People have failed in their burden. [Citations.]

"On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]" (*Delgado, supra*, 43 Cal.4th at pp. 1065-1067.)

In *Delgado*, the defendant was alleged to have suffered a prior conviction under section 245, subdivision (a)(1), which, it was further alleged, constituted a serious felony. The People's sole proof was a package of certified documents pertaining to the conviction, including an abstract of judgment that "specified the statute violated as '[Penal Code section] 245(A)(1)' and described the crime as 'Asslt w DWpn.' " (*Delgado, supra*, 43 Cal.4th at p. 1063.) The state high court found this evidence sufficient to sustain the trial court's finding that the prior conviction was for a serious felony. (*Id.* at p. 1072.) The court explained:

"This . . . description [of the offense set out in the abstract of judgment] tracks one, but only one, of the two specific, discrete, disjunctive, and easily encapsulated forms of aggravated assault set forth in section 245(a)(1). . . . [T]he instant abstract does not mention the other specific, discrete, and disjunctive form of section 245(a)(1) violation, involving force likely to produce GBI. . . . [I]t does not simply cite the statute violated, without any reference to the underlying conduct. Any inference that this notation simply refers to the statute generally is thus sharply diminished.

> "The People therefore presented prima facie evidence, in the form of a clear, presumptively reliable official record of defendant's prior conviction, that the conviction was for the serious felony of assault with a deadly weapon. Defendant produced no rebuttal evidence. Utilizing the presumption of official duty, and drawing reasonable inferences from the official record, the trial court, as a rational trier of fact, could thus properly find beyond reasonable doubt that a prior serious felony conviction had occurred." (*Delgado*, *supra*, at pp. 1069-1070, fn. omitted.)

Delgado is dispositive here. Defendant's reliance on *People v. Learnard* (2016) 4 Cal.App.5th 1117, 1120-1121, 1124 (insufficient evidence where abstract of judgment described offense as " 'Assault w deadly wpn/GBI' "), review granted February 22, 2017, S238797, is unavailing.

Defendant says that if we conclude the evidence was sufficient, we must nevertheless strike the one-year enhancement imposed, pursuant to section 667.5, subdivision (b), for the 2012 conviction. The Attorney General concedes defendant is correct. We do not accept the concession. Rather, we conclude the sentencing minutes contain a clerical error that must be corrected.

As previously stated, the information alleged defendant served six prior prison terms within the meaning of section 667.5, subdivision (b). One of these arose from the 2012 conviction, which also gave rise to a five-year enhancement pursuant to section 667, subdivision (a).

The parties accurately observe that a sentence cannot be enhanced both for a prior conviction and for a prison term imposed for the same conviction. (*People v. Jones* (1993) 5 Cal.4th 1142, 1144-1145.) Rather, "when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*Id.* at p. 1150.)

Here, the clerk's sentencing minutes reflect dismissal of "ALLEGATION NUMBER 9," but the imposition of a five-year enhancement, pursuant to section 667, subdivision (a), for "ALLEGATION NUMBER 3" and a consecutive one-year enhancement, pursuant to section 667.5, subdivision (b), for "ALLEGATION

NUMBER 4." Counting the section 12022.7 allegation as number 1 with respect to count 3 of the information, as it appears the clerk did, allegation number 3 is the serious felony enhancement, and allegation number 4 is the prior prison term enhancement, arising from defendant's 2012 conviction.[7]

At sentencing, however, the trial court stated: "[I]t's going to be ordered that the Defendant[] [is] to serve the upper term of 12 years regarding Count 3. Serve an additional three years pursuant to [section] 12022.7, and an additional five years pursuant to [section] 667(a), and five more years based on five sections [*sic*] of 667.5(b). *Although the Defendant was found guilty of six violations of [section] 667.5(b), one of them was unable to be utilized as the same term of imprisonment as the [section] 667(a) enhancement*. [¶] . . . [¶] Therefore, the Defendant will be sentenced as follows: [¶] As to Count 3, a violation of . . . [s]ection 273A(a) with the [section] 667(e) prior, probation will be denied and the Defendant will be sent to the Department of Corrections for the upper term of 12 years; that sentenced [*sic*] to be enhanced by three years pursuant to section 12022.7 . . . ; that sentence to be further enhanced by five years pursuant to section 667(a) . . . ; . . . that sentence to be further enhanced by five years . . . pursuant to five sections [*sic*] of 667.5(b) . . . , for a total fixed term of 25 years." (Italics added.)

It is clear from the foregoing that the trial court did *not* impose a one-year enhancement for the 2012 conviction. Because the court's oral pronouncement of judgment is, under the circumstances, entitled to greater credence than the clerk's minutes, the oral pronouncement of the court controls. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 586, disapproved on another ground in *People v. Hall* (2017) 2 Cal.5th 494, 503-504, fn. 2.) The error in the minutes

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[7] Allegation number 9 involves a 1985 conviction and prison term resulting from a violation of section "484/666." The abstract of judgment shows the imposition of five 1-year enhancements pursuant to section 667.5, subdivision (b), but does not specify the basis therefor.

is a clerical one that we will order corrected. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *In re Candelario* (1970) 3 Cal.3d 702, 705.)

III

THE 1989 CONVICTION

Sentencing took place on February 24, 2016. Pursuant to section 667.5, subdivision (b), the trial court imposed a one-year enhancement for defendant's service of a prison term as a result of his 1989 conviction, in Monterey County Superior Court case No. CR14503, for violating Health and Safety Code section 11350, subdivision (a). On September 7, 2017, the Monterey County Superior Court granted defendant's application to have this felony conviction designated as a misdemeanor.[8] (§ 1170.18, subd. (f).)

Defendant now contends the one-year enhancement imposed in his current case for the 1989 conviction must be stricken, because the underlying felony conviction was reduced to a misdemeanor for all purposes pursuant to Proposition 47.[9] We conclude he is not entitled to relief.

In *People v. Call* (2017) 9 Cal.App.5th 856, 859-860, we summarized the voter initiative known as Proposition 47 as follows: "Proposition 47 was enacted by voters on November 4, 2014, and went into effect the next day. [Citations.] It reduced certain felony or wobbler drug- and theft-related offenses to misdemeanors, unless committed by a defendant who was ineligible because he or she had a prior conviction for a 'super strike' offense specified in section 667, subdivision (e)(2)(C)(iv) or an offense requiring

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[8] The information erroneously shows the case as one arising in Kern County Superior Court.

By separate order, we have taken judicial notice of the Monterey County Superior Court's order reducing defendant's 1989 conviction.

[9] The issue is currently on review before the California Supreme Court. (E.g., *People v. Valenzuela* (2016) formerly 244 Cal.App.4th 692, review granted March 30, 2016, S232900.)

sex offender registration pursuant to section 290, subdivision (c). [Citations.] Insofar as is pertinent here, it also provided a mechanism by which a person who completed his or her sentence for a conviction of a felony that was made a misdemeanor by the [voter initiative] could apply to the trial court that entered the judgment of conviction and have the felony offense designated as a misdemeanor. (§ 1170.18, subds. (f), (g).)" Subdivision (k) of section 1170.18 provides, with exceptions not pertinent here, that when a felony conviction has been redesignated as a misdemeanor, it "shall be considered a misdemeanor for all purposes . . . ."

In *People v. Johnson* (2017) 8 Cal.App.5th 111, review granted April 12, 2017, S240509 (*Johnson*), we held that where, as in defendant's case, a sentence enhanced by a section 667.5, subdivision (b) prior prison term had already been imposed at the time the felony that gave rise to the prison term was reduced to a misdemeanor pursuant to Proposition 47, the redesignation of that prior felony did not alter the current sentence. (*Johnson*, *supra*, at p. 115.) Informing our analysis were the California Supreme Court's discussion, in *People v. Park* (2013) 56 Cal.4th 782, of the analogous "misdemeanor for all purposes" language contained in section 17, subdivision (b)(3); section 3's presumption of prospective operation; the qualification to this presumption set forth in *In re Estrada* (1965) 63 Cal.2d 740; voters' intent in enacting Proposition 47; and the purpose of an enhancement under section 667.5, subdivision (b). (*Johnson*, *supra*, at pp. 118-122.) We concluded: "Defendant served a prison term for the prior convictions at a time the offenses were felonies. It is the service of that prison term, coupled with defendant's continuing recidivism, that section 667.5, subdivision (b) punishes. Absent a clear statement of the electorate's intent to the contrary — which we do not find — we conclude that, because defendant served a prison term for his [prior] convictions . . . at a time when the offenses were felonies, and had his current sentence enhanced accordingly *before* the convictions were reduced, he is not entitled to relief." (*Id.* at p. 123.)

We find our reasoning in *Johnson* to be persuasive, and decline to depart from it. Because the section 667.5, subdivision (b) enhancement at issue in the present case was imposed before the underlying felony was reduced to a misdemeanor, defendant is not entitled to have the enhancement stricken.[10]

Defendant says that if we reach this conclusion, then his trial attorney violated defendant's constitutional right to the effective assistance of counsel by failing to obtain an order designating the prior conviction as a misdemeanor prior to defendant's sentencing hearing in the present case. (See generally *People v. Call*, *supra*, 9 Cal.App.5th at pp. 862-863.) Defendant has failed to establish grounds for relief on appeal.

The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to

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10 Appellate counsel represents the Monterey County Superior Court also reduced defendant's 1985 conviction in case No. CR11173 to a misdemeanor, but says the trial court in the present case dismissed the section 667.5, subdivision (b) enhancement based thereon. As explained, *ante*, the trial court did *not* dismiss that enhancement. Although appellate counsel has not asked us to take judicial notice with respect to the 1985 conviction, presumably due to the erroneous belief it was dismissed, our analysis and conclusions concerning defendant's 1989 conviction apply equally to his 1985 conviction. Should the California Supreme Court agree with defendant's position and transfer this case back to us for reconsideration, we invite appellate counsel to obtain a certified copy of the Monterey County Superior Court's order reducing defendant's 1985 conviction and request that we judicially notice it, so that we may then dispose of both affected prior convictions.

undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

"[O]ur review on a direct appeal is limited to the appellate record. [Citations.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183.) "Defendant has the burden of establishing, based on the record on appeal [citations] and on the basis of facts, not speculation [citation], that trial counsel rendered ineffective assistance. [Citation.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 876-877.)

The record on appeal sheds no light whatsoever on what trial counsel did, or did not do, to attempt to get defendant's prior conviction redesignated as a misdemeanor prior to sentencing. Appellate counsel asserts she was able to get it and defendant's 1985 conviction reduced, but her statements are not evidence (cf. *In re Brown* (2013) 218 Cal.App.4th 1216, 1218-1219, 1221), and merely speculate that because she was able to accomplish something, trial counsel necessarily could have done the same thing. But the record before us does not show when trial counsel learned defendant had one or more prior convictions that were eligible for reduction, whether counsel made any attempt to contact the Monterey County public defender's office, or if a reduction could have been obtained prior to sentencing in the present case. In short, neither deficient performance nor prejudice can be established on the record before us. Accordingly, defendant's claim fails at this juncture. (See *People v. Barnett*, *supra*, 17 Cal.4th at p. 1183.)

DISPOSITION

The judgment is affirmed. The trial court is directed to cause the minutes of the February 24, 2016, sentencing hearing to be corrected to reflect, as to count 3, that allegation number 4 (Pen. Code, § 667.5, subd. (b) enhancement based on conviction for violation of Pen. Code, § 245, subd. (a)(1) on or about Feb. 29, 2012) was dismissed, while a consecutive term of one year was imposed pursuant to allegation number 9 (Pen. Code, § 667.5, subd. (b) enhancement based on conviction for violation of Pen. Code,

§§ 484, 666 on or about July 9, 1985), and to forward a certified copy of same to the appropriate authorities.

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DETJEN, J.

I CONCUR:

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LEVY, Acting P.J.

FRANSON, J., concurring and dissenting

I respectfully dissent from the majority's portion of the opinion addressing Cota's Penal Code[1] section 667.5, subdivision (b) enhancement. (Maj. Opn. at pp. 11-14.)

Section 667.5 And Proposition 47

Cota committed the offenses that are the subject of this appeal in June 2015. Cota was sentenced on February 24, 2016, and appealed. During his appeal, the Monterey County Superior Court granted Cota's application to have his 1989 conviction, for which a section 667.5, subdivision (b) enhancement was imposed, redesignated as a misdemeanor under Proposition 47 (§ 1170.18). The petition was granted on September 7, 2017.

The issue as presented is whether the additional one-year enhancement imposed by the trial court for the 1989 prior conviction must now be stricken because, subsequent to Cota's conviction and sentencing, the 1989 prior conviction was reduced to a misdemeanor pursuant to section 1170.18, subdivision (f). I conclude defendants may challenge prior prison term enhancements based on reclassified convictions so long as the enhanced sentence is not subject to a final judgment. (See *People v. Evans* (2016) 6 Cal.App.5th 894, review granted Feb. 22, 2017, S239635 (*Evans*).)

On November 4, 2014, before Cota committed the current offenses, voters enacted Proposition 47, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) As relevant here, the Act reduced certain felony drug possession offenses to misdemeanors, unless committed by an ineligible defendant. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108; see § 1170.18, subd. (i).) It also provided a mechanism by which a person who had completed his or her sentence for a conviction of a felony that was made a misdemeanor by the Act, could apply to the trial

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1 All further statutory references are to the Penal Code.

court that entered the judgment of conviction and have the felony offense designated as a misdemeanor. (§ 1170.18, subds. (f), (g).) Section 1170.18, subdivision (k) specifies that any "felony conviction that is … designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes" except resentencing does not permit the person to own or possess a firearm.

Neither Proposition 47 nor the ballot materials addressed section 667.5 or recidivist enhancements. However, it is apparent that Proposition 47 was intended to reduce punishment for "nonserious, nonviolent crimes like petty theft and drug possession." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (3), p. 70). In addition, one of the purposes of Proposition 47 was to "ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime …." (*Id.,* § 2, p. 70.) To achieve that end, the measure "[r]equire[s] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession." (*Id.,* § 3, subd. (3), p. 70.) The electorate also directed that Proposition 47 "'shall be liberally construed to effectuate its purposes.'" (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1222.)

Cota contends the benefits of section 1170.18, subdivision (k) under Proposition 47 should apply to non-final judgments, like his. I agree. The plain language of Proposition 47 ("shall be considered a misdemeanor for all purposes") explicitly anticipates misdemeanor classification will affect the collateral consequences of felony convictions, except permitting ownership or possession of a firearm. Section 1170.18, subdivision (k)'s "for all purposes" language is broad, and reflects the voters' clear intention that –with the exception of firearm possession—reclassified misdemeanors be treated like any other misdemeanor offense, including for purposes of enhancements under section 667.5, subdivision (b). (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 746.)

Here, Cota committed his 2015 crimes and sentence was imposed before the 1989 offense was reduced to a misdemeanor in 2017. However, the judgment in his 2015 case was not final at the time the 1989 conviction was reduced to a misdemeanor because that judgment was appealed and that appeal is currently pending. (See *People v. Towne* (2008) 44 Cal.4th 63, 80-81.) Defendants may challenge prior prison term enhancements based on reclassified convictions so long as the enhanced sentence is not subject to a final judgment. (See *Evans, supra*, 6 Cal.App.5th at p. 904.)

My conclusion that section 1170.18, subdivision (k) applies to non-final enhancements comports with the holding of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), that when an amendatory statute mitigates punishment, contains no savings clause, and "becomes effective prior to the date the judgment of conviction becomes final," the new statute and "not the old statute in effect when the prohibited act was committed," applies. (*Id.* at p. 744.) "The key date [in determining whether a defendant receives the benefit of a statutory change] is the date of final judgment." (*Ibid*.) Like *Estrada* and *Evans*, Proposition 47 took effect, and Cota's 1989 felony offense was reduced to a misdemeanor, before Cota's judgment of conviction was final.

Based on the language of section 1170.18, the voter's intent in passing the initiative, *Estrada, Evans*, and the majority of cases that have addressed this issue, I conclude Proposition 47 applies to sentence enhancements not yet final and I disagree with the holding of *People v. Johnson* (2017) 8 Cal.App.5th 111, 115, review granted April 12, 2017, S240509.[2]

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[2] The issue is currently pending review in the California Supreme Court. (See *People v. Hicks* (Aug. 24, 2017, F071016) [nonpub. opn.], review granted Nov. 15, 2017, S244616; *People v. Johnson, supra*, 8 Cal.App.5th 111, review granted; *In re Diaz* (2017) 8 Cal.App.5th 812, review granted May 10, 2017, S240888; *Evans, supra*, 6 Cal.App.5th 894, review granted; *People v. Jones* (2016) 1 Cal.App.5th 221, review granted Sept. 14, 2016, S235901; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Ruff* (2016) 244 Cal.App.4th 935, review

Cota urges us to strike the prior prison term enhancement which, in essence, asks this court to resentence him. Since Cota has not been evaluated for resentencing under subdivisions (a), (b), and (c) of section 1170.18, simply striking the prior prison term on appeal would usurp the trial court's discretion to deny resentencing on the ground Cota poses an "'unreasonable risk of danger to public safety.'" (See § 1170.18, subds. (b) & (c); *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992 ["This discretion to find an unreasonable risk provides the 'safety valve' to protect the public"].) Consequently, I would remand the matter to the sentencing court to strike the enhancement unless it determines Cota poses an unreasonable risk of danger to public safety.

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FRANSON, J.

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granted May 11, 2016, S233201; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900.)